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Jan. 4. 1755.

ANSWERS

FOR

Charles Schaw of Sauchie, Lord Cathcart,

TO THE

Petition of John Stewart-Schaw of Greenock,

and of Sir Michael Stewart of Blackhall,

his Father and Administrator in Law.

THE Settlements of the Estate of Greenock from 1685 downwards, and more particularly in the late Sir John Schaw's Marriage Contract with Mrs. Margaret Dalrymple, in the Year 1700, have been so fully set forth in the former Papers, that it would be improper upon this Occasion minutely to re-state the same: From these the Respondent will take it for granted, that however the Petitioner may find it for his Interest to suppose that it was only a nominal Fee which was vested in the late Sir John by the Charter and Infeftment 1686; yet as the Rights themselves are diametrically repugnant to this Supposition, so they prove that Sir John the Father was thereby constituted a naked Liferenter, with certain reserved Powers, and the absolute Fee or Property vested in Sir John the Son.

And as a Consequence of this, the Respondent does with equal Reason contend, that when by the Marriage contract 1700, the late Sir John Schaw came to make a new Settle-

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ment of that Estate, and to limit not only the Heirs of Entail, but even himself the former Proprietor, every Faculty and Power reserved to him by that Marriage contract and Tailzie therein contained, can with no Justice be considered as a new created Right in Sir John, but as so much of his former Property, which remained with him free and disengaged from all the Fetters of the Entail; and as a Consequence of the Premises, that every doubtful Clause, if such there is, relative to the Extent or Exercise of these Powers, falls to be construed in the most liberal and beneficial Manner. A reserved Liferent is in many Respects by the Law of *Scotland* a much stronger Right than a created Liferent; and upon the same Principle, reserved Powers ought to be more liberally construed than created Powers. What is reserved is not given away, and no more is granted but the Residue that remains, deducing what is reserved.

The Application of these Principles to the Case in hand, will be obvious and easy, when upon the several Points resumed in this reclaiming Petition, it will be the Subject of your Lordships Consideration, what Powers were meant to be reserved to Sir John by the aforesaid Marriage Settlement.

It will then occur to your Lordships, that the aforesaid Marriage contract falls to be considered in a double View; *first*, As making Provision for the Uses of that Marriage, *viz.* for the Lady *quoad* her Liferent; For the Heir-male of the Marriage *quoad* the Right of Succession; and for the Daughters of the Marriage *quoad* their Provisions, in the Events therein-mentioned. *2dly*, As containing a voluntary Settlement or Tailzie of the Estate in favours of collateral Heirs, failing Sons of the Marriage, in which the Bride and her Friends had no Concern.

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And as in Fact it happened that there was no Issue-male of the aforesaid Marriage, and but one only Daughter the Mother of the now Respondent, whereby Sir John was naturally



ly led to exerce every reserved Power in favours of his only Child, the Daughter of that very Marriage; the now Petitioner, not satisfied with the Advantages he has reaped by succeeding to this Estate, in prejudice of Sir John's own Issue, has thought himself at Liberty to challenge every single Deed granted by Sir John, in consequence of these reserved Powers; and as your Lordships gave Judgment upon the several Points in Dispute, it is against so many of these that this reclaiming Petition is offered, though as the Respondent verily believes, without any the least Hope or Prospect of prevailing upon any one of these Articles, which may be reduced under these three general Heads; *first*, The Annualrents of the 30000 Merks, which by the Marriage-contract itself, failing Heirs-male of the Marriage was ascertained to be the Provision of the only Daughter of that Marriage. *2dly*, The Feus of the Town of *Greenock*, and Brae adjacent thereto. And, *3dly*, The Tack of the wester Barony of *Greenock*. For though there are a Variety of other Particulars overly touched at, it is to these above-mentioned that the Prayer of the Petition is confined; and as your Lordships have allowed the Petition to be answered, the Respondent is now to endeavour to maintain the Justice of that Interlocutor in the several Particulars above-mentioned.

And to begin with the Annualrent of Lady *Cathcart's* Provision, the Clauses in the Marriage Settlement proper to be taken notice of as relative thereto, are these following; *1st*, That Clause, whereby, notwithstanding of the general Prohibition *de non alienando & contrahendo*, it is provided and declared, 'that it shall be lawful to the said John Schaw or any of the Heirs of Tailzie, to contract the Sum of 50,000 Merks of Debt, and therewith to affect and burden the said Lands and Estate for providing of their Daughters or younger Children,' under this Proviso, 'that the legal Reversion of any Adjudication to be used for Security of the Debt allowed by thir Presents to be contracted

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• *trasted* for providing the Children, shall never expire to
 • carry away the irredeemable Right to the said Lands and
 • Estate, or any Part thereof, but the said Adjudications shall
 • be always redeemable upon paying the Sums for which the
 • same shall be obtained, *with the Annualrents thereof.*
 2^{dly}, That other Clause which tends to explain the former,
 whereby it is in like Manner provided, that it shall be law-
 • ful to the said *John Schaw*, in case of his subsequent Mar-
 • riages, and to the other Heirs of Tailzie abovespecified, whe-
 • ther Male or Female, to provide and infest their lawful Spouses
 • in competent Liferent Provisions of the Lands and others fore-
 • said, not exceeding a fourth of the free Rent of the same for the
 • Time, *the Annualrents of Childrens Portions, and o-*
 • *ther Sums wherewith the said Lands shall be, and are by*
 • *thir Presents allowed to be burdened in Manner after*
 • *mentioned, &c. being always first discompted.* 3^{dly},
 That Clause whereby in respect that failing Heirs-male to
 • be procreated in this present Marriage, the Daughters or
 • Heirs-female to be procreated of the same, are, and shall
 • be by this present Contract, and Infestments appointed to
 • follow thereupon, cut off and excluded from their Right of
 • Succession in the said tailzied Lands and Estate; and it be-
 • ing just and reasonable that the said Daughters should be in
 • that Case competently provided according to their Qualities
 • therefore the said Sir *John* and *John Schaws* by thir Pre-
 • sents bind and oblige them conjunctly and severally, and
 • their Heirs-male and of Tailzie succeeding to them in
 • the *aforesaid* Lands and Estate to content and pay to
 • the said Daughters, one or more who shall be procreated of
 • the said Marriage, failing of Heirs-male thereof, the particu-
 • lar Portions and Provisions after mentioned, *viz.* if there
 • be only one Daughter, the Sum of 30000 Merks (after which
 • follows the Provision of the Daughters, if two or more) and
 • which Portions shall be paid at the said Daughters their se-
 • veral Ages of 16 Years complete, or at their respective
 • Mar-

* riages, which of them shall first happen, with 100 Merks
 * Scots as liquidate Penalties for ilk 1000 Merks of their said
 * Portions, together also with the Annualrents of the same
 * respective Portions continually during the Not-payment
 * thereof after the same Terms of Payment above menti- p 394
 * oned. — And it is hereby provided and declared, that
 * the said Lands and Estate of Greenock, and others a-
 * bove mentioned, shall be the Subject wherewith the said
 * 50000 Merks is to be burdened (i. e. the 50000 Merks there-
 * by ascertained to be the Provision of the Daughters, if
 * three or more in Number). 4thly, That other Clause
 * which declares ' that this present Tailzie and Irritancies there-
 * of are and shall be no ways prejudicial to any Execution
 * competent upon this Contract in so far as the same is con-
 * ceived in favours of the said Mrs. Margaret Dalrymple,
 * and the Daughters of the Marriage failing of Heirs-
 * male thereof, which Provisions in favours of the Daughters
 * of this Marriage are declared to exhaust the Faculty above-
 * mentioned of burdening the Estate for Provision of Chil-
 * dren, in case the same shall be exercised as a Burden upon
 * the said tailzied Estate *pro tanto*.

From comparing these several Clauses relative to the different
 Purposes for which they were calculated, it is material to observe,
 1st, That the Faculty or Power to contract the Sum of 50000
 Merks of Debt, and to burden or affect the Estate therewith
 for Provisions to younger Children, was common to Sir John
 and the whole Heirs of Entail, to the remotest Generation; it
 imposed no actual Burden, but impowered Sir John, and the
 Heirs of Entail in their Order, to charge the Estate to that
 Extent, by contracting Debt thereon, or otherways. 2dly,
 But with Respect to the Provisions, thereby ascertained to the
 Daughters of that Marriage as an Equivalent, or in consideration
 for their being excluded from their natural Right of Succession,
 in the Event of there being no Sons of the Marriage, the Lady's
 Friends would not rely upon a personal Obligation to pay, or
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upon a Power or Faculty to charge the Estate, they insisted with Reason, that, in respect of the Daughters Exclusion, a Sum certain should be fixed for the Daughters Portions, payable at a certain Age, or their Marriage, which of them should first happen, with Interest from the Term of Payment; and that the Estate of *Greenock* should be the Fund for the Payment of these Portions, and Annualrents thereof: And as the Portions thus ascertained were thereby made real Burdens upon that Estate, so it is remarkable, that it is the Heirs-male and of Tailzie succeeding to the said Estate, and those only that are subjected to the personal Obligation to pay. 3^{dly}, That not only the 50000 Merks, wherewith the Estate was allowed to be charged, for Provisions to younger Children in general throughout the whole Line of Succession, but also the Annualrents thereof, or of such Part as in Fact should be charged upon the Estate, were to have a real Lien thereon, is not only consequential of the Faculty and Power given to contract Debt, and to burden and affect the Estate to that Extent, for Provisions to the younger Children, which would have been highly absurd, if the Creditor who lent the Money, or the Children whose Provisions were to be thus ascertained, were not to have the like Security for the Annualrent as for the principal Sum. But it will be further obvious from that other Clause, whereby Sir *John*, and the several Heirs of Entail were empowered to give Liferent-provisions to their Wives, not exceeding the fourth Part of the free Rent, *discompting the Annualrents of the Childrens Portions, and other Sums wherewith said Lands shall be, and are by thir Presents allowed to be burdened*; manifestly supposing, that the Annualrents of the Childrens Provisions were to be *in pari casu* with the principal Sum itself, and equally to burden the tailzied Estate. 4^{thly}, But that a Distinction was thereby made between the general Faculty and Power to contract Debt, and burden the Estate for Provisions to younger Children, and the special Burden imposed for the Portions of the Daughters of that Marriage; that *quoad* the

the first, no Adjudications deduced upon these were ever to expire, but to be still redeemable upon Payment of the principal Sum and *Annualrents*; whereas with respect to the Portions of the Daughters of that Marriage, and the Provisions to the Lady, these were to be considered in every Respect upon the same Footing as if no Tailzie had been contained in that Marriage-contract, but a simple Provision of Succession.

Your Lordships have had Occasion to know, that, as there was no Issue male of this Marriage, nor any Prospect of such, and but one only Daughter, whose Portion was thereby ascertained to be 30000 Merks, bearing Interest from her Age of sixteen, or Marriage, and as such having a real Lien upon that Estate appropriated to be the Fund of Payment; and as it was optional for Sir *John*, in consequence of his reserved Faculty and Power to add thereto the further Sum of 20000 Merks, in order to exhaust the whole 50000 Merks, wherewith he and every Heir of Entail was intitled to charge the Estate for Provisions to younger Children. It appeared to Sir *John* to be expedient and just, all Circumstances considered, and the inadvertent Exclusion of his own Daughter from her natural Right of Succession, by the Preference given to his Sister and her Issue, to exerce his reserved Faculty and Power in favours of his said Daughter, and which was the more rational, as he had then in view of disposing of her in Marriage much to his Satisfaction, to the then Master of *Cathcart*.

Accordingly, by Marriage-articles of this Date, between *Charles* Master of *Cathcart*, and Mrs. *Marion Schaw*, the only Daughter of the aforesaid Marriage, Sir *John Schaw*, the Father of the young Lady, bound and obliged himself, and his Heirs of Tailzie succeeding to him in the Estate of Greenock, to content and pay to the said *Charles* Master of *Cathcart* the Sum of 50,000 Merks of Tocher with his said Daughter, within Year and Day after Solemnization of the Marriage, with Interest from the Marriage.

And

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1718.

And in Implement of the said Marriage articles, Sir *John Schaw*, of this Date, granted three heritable Bonds to the Master of *Cathcart*; the first for 30,000 Merks, bearing to be in Implement of the Obligation upon Sir *John* and his Heirs of Tailzie by the Marriage-contract 1700, to pay that Sum to an only Daughter; the second Bond for 17,000 Merks; the third for 3000 Merks: These two last bearing to be in Exercise of the Faculty and Power reserved to Sir *John* in the aforesaid Marriage-contract, to contract 50,000 Merks of Debt, and therewith to affect and burden the tailzied Estate, for providing Daughters or younger Children; all these Sums payable at *Whitsunday* 1719, with Interest from the 29th *March* 1718, (the Date of the Marriage) each of these Bonds containing an Obliment upon Sir *John* and his Heirs of Tailzie in the Estate of *Greenock*, to pay said Sums, a Procuratory of Resignation and Precept of *Saline* for infesting in an Annualrent corresponding to said Sums, upliftable out of the Estate of *Greenock*; and an Obligation upon the Heirs of Tailzie succeeding to the said Estate, to relieve Sir *John's* other Heirs and Successors thereof.

As no Payment had been made to Account of these Bonds, either Principal or Annualrents, during Sir *John's* Lifetime, the chief Point in Dispute between the now contending Parties was, To what Extent these Bonds would be sustained, as an effectual Charge against the Estate of *Greenock*? It was pleaded for the now Respondent, that the whole 50,000 Merks, and bygone Annualrents, had a real Lien upon that Estate, and were an effectual Burden upon the Heirs succeeding thereto, who were primarily liable therefor, and could have no Relief against Sir *John's* other Heirs succeeding to any separate Estate which belonged to him; and this the Respondent endeavoured to maintain from the several Clauses in the Marriage-contract 1700, as above recited, and Bonds granted in Consequence thereof.

The Petitioner was pleased to admit, that the 50,000 Merks was a proper Burden upon the tailzied Estate; and that thus
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far he had no Claim of Relief; but then he insisted, that the
aforesaid reserved Faculty gave no Power to burden the tail-
zied Estate *quocunque nomine*, with any Sum beyond the
50,000 Merks; that it was incumbent upon Sir *John*, during
his Possession, to have paid the current Annualrents, both of
the 30,000 Merks, which was the Portion certain of the Daugh-
ter of that Marriage, and of the 20,000 Merks, which Sir
John in Exercise of his reserved Faculty thought proper vo-
luntarily to grant, as an Addition to the Daughter's Portion;
and therefore, that the Respondent, who had succeeded to Sir
John in a separate Estate, was bound to relieve him the Heir
of Entail of these Annualrents. Your Lordships steered a
middle Course between these two Extremes, by Interlocutor
10th *August* 1754, and thereby in Substance found, That
the Pursuer is not intitled to any Relief against the Defender,
as Heir of Line, of the Annualrents of the 30,000 Merks,
contained in the heritable Bond granted in Implement of the
Obligation in the Marriage-contract, to pay that Sum to the
only Daughter of the Marriage; but found, that the Pursuer
is intitled to Relief against the Defender, as Heir of Line
aforesaid, of the Annualrents of the other two Bonds, the
one for 17,000, the other for 3000 Merks, incurred during
the Life of Sir *John Schaw*; and therefore found the Pur-
suer liable in Payment of the aforesaid principal Sum of
50,000 Merks, and Annualrent of the 30,000 Merks, from
the 29th *March* 1718, and Annualrent of the other 20,000
Merks since Sir *John Schaw's* Death; and likewise of the
Sum of 3000 Merks of Penalty, contained in the Bond for
30,000 Merks.

The Importance of this Question has led both Parties to
submit the Point to your Lordships Review. The now Re-
spondent has reclaimed against such Part thereof as finds him
liable in Relief of the Annualrents of the 20,000 Merks that
were incurred during Sir *John Schaw's* Lifetime; and as in
that reclaiming Petition, the whole Argument upon the Questi-

on of Relief is very distinctly and fully stated, it would be improper upon this Occasion to repeat the same. If these shall be available to procure an Alteration of that Part of the Interlocutor which sustains Relief for the Annualrents of the 20000 Merks, they must at least be equally conducive to confirm the other Branch of that same Interlocutor which denies Relief for the Annualrents of the 30,000 Merks. But as the Petitioner has thought proper likewise to reclaim touching the Annualrents of the 30,000 Merks, and which is allowed to be answered, the Respondent shall endeavour in very few Words, to maintain the Justice of what your Lordships have so found; referring to his reclaiming Petition for illustration of the Argument.

And in the Entry it may be proper to observe, that that Relief which the Law gives between Heirs and Executors, does not apply to the present Case: Nor are there here *termini habiles* for a Question of that kind. Sir John's personal Debts being much more than sufficient to exhaust his personal Estate. The Division of a Succession into Heritage and Moveables is the Act of the Law, which in Effect constitutes a double Succession, the one of the Heritage in favours of the Heir, the other of the Moveables in favours of the Executor. And upon the same Principle the Law makes a relative Division of the Debts. Those that are personal, or properly moveable, are made a Burden upon the Executry; those that are heritable, a Burden upon the heritage; and though the whole Estate is equally liable to the Creditors, they have Relief against each other according to the Nature of the different Debts.

But in Questions amongst the Heirs themselves, who are of different Kinds, and may succeed to different Parts of the Estate, according as the same stands limited and provided to the different Classes of Heirs, the Law gives no Relief; nor is it optional to the Creditor to exact his Payment from the one or the other; he must take them in the Order in which the Law has thought proper to subject them to their Predecessors Debts.

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beginning with the Heir of Line, or Heir general, and so in their Order, discussing the one, before he can have Access to the other

But this general Rule in the Case of Heirs, admits of the following Exceptions; *first* That if the Bond or other Obligation, which is the Ground of Action, lays the Burden of that Obligation upon a particular Heir *primo loco*, or if the Debt is really secured upon an Estate limited to a particular Heir; as for Instance, to the Heir-male or Heir of Provision, that Heir and his Estate is primarily liable for Payment and Performance of that Obligation, or, if it shall be supposed that the Creditor could have immediate Access against the other Heirs, they would in such Case be intitled to Relief against that Heir or his Estate that was made primarily liable by the Bond or other Security.

These the Respondent is advised are Principles which cannot be contested, but as these Regulations by the Act of the Law do only take Place in the Succession *ab intestato*, & *ex pre-sumpta voluntate defuncti*, where nothing to the contrary appears, the Justice of the Law has left it optional for every Proprietor to regulate his Succession among the different Heirs, and the Burdens affecting the same in such Manner as he thinks proper; as he may burden his Executry with the Payment of all his heretable Debts, so he may burden his Heir with Relief to his Executor of all his personal Debts. He may oblige his Heir-male and of Provision in relief to the Heir of Line; and on the other Hand, he may oblige his Heir of Line to relieve the Heir of Entail even of such Debts and Incumbrances as have a real Lien upon the Estate, provided to the Heir-male. In a Word, he is at absolute Liberty to cut and carve in those Matters at Pleasure amongst his different Heirs, and they must take the Estate as he gives it, or repudiate it altogether.

And as a Consequence of the Premises, if he obliges any particular Heir, or burdens any particular Estate with the Payment of this or the other Debt, such Heir and such Estate can have

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have no Relief against the other Heirs, or the other Estates; it becomes their own Debt, as much as they had granted their own Obligation for it.

If Sir *John* had Power so to regulate Matters amongst his own Heirs, he has done it most effectually, in so far as he has not only subjected his Heirs of Tailzie succeeding in that Estate to the personal Obligation to pay the 30,000 Merks, and Annualrents thereof, but has given those a real Security upon the tailzied Estate, and has declared that Estate to be the Fund of Payment, which, as it denotes the Anxiety of Parties, that this Provision to the only Daughter, should, in all Events, be a Burden upon the tailzied Estate, and payable out of that Subject *primo loco*, or by the Heir of Entail succeeding thereto; so it is a Circumstance of some Consideration, that this Provision was so anxiously made in a Marriage contract, whereby Sir *John* was limiting this Estate of *Greenock*, failing Issue male of his own Body, to collateral Heirs male, and even to collateral Females, and their Issue, in Exclusion of Sir *John's* own Daughters, the natural Heirs. Under these Circumstances the 30,000 Merks ascertained for the Portion of an only Daughter was the Price or Consideration given to her by way of Remuneration for her Exclusion, which Price it was but just and natural should be paid by these Heirs, who were to reap the Benefit of that Exclusion, and out of that Estate from which the Daughter was so excluded.

And when to this is added, that the Daughters of the Marriage behaved to be Sir *John's* Heirs of Line, and as such intitled to succeed to him in any separate Estate, this anxious Provision, obliging the Heir male succeeding to the Estate of *Greenock* to pay the Daughters Portion, and making that Estate the Fund of Payment, it was obviously in the View of Parties, that the Daughter of the Marriage should have an effectual Charge against that Estate for Payment of her 30,000 Merks, and Annualrents thereof; and that the Heir of Tailzie succeeding to that Estate should have no Claim of Relief against the

the Daughter, under Pretence of her having succeeded to Sir John in any separate Estate. This is confessedly the Case with respect to the principal Sum; and it does not occur what Ground there is for distinguishing between it and the Annualrents; both are contained in one and the same Obligation, and have one and the same Security. The tailzied Estate is *in terminis* declared to be the Fund of Payment.

And therefore it is begging the Question to consider Sir John Schaw as a Trustee or Fiduciary Heir, who was bound to transmit the Estate to the Heirs of Entail, *tantum & tale* as it stood when he himself imposed the Entail, or as under an implied Obligation *ex natura fide commissi* to pay the current Annualrents of the 30000 Merks during his Incumbency.

It has been already said, and the Respondent hopes with some Reason, that as Sir John was unlimited Fiar before he entered into this Marriage-contract, tho' by his voluntary Act and Deed he thereby established an indefeasible Order of Succession, and put himself under certain Limitations and Restraints; yet as he did not divest himself of the Fee, he remained absolute and unlimited Proprietor in every Respect, excepting in so far as he thereby limited himself; and as he brought himself under no Obligation in favours of his Heirs of Entail, to indemnify or relieve them of the current Annualrents of the 30000 Merks after it should become due, it is begging of the Question to suppose, that such Obligation is implied. The Grant of the Estate to these collateral Heirs was a Free-will Offering of Sir John's, which he was at Liberty to qualify as he thought proper; and it would be highly unjust by Implication to impose any Fetters upon him, beyond what he had expressly subjected himself to.

And to illustrate the Absurdity of this Argument, when applied to the Case in Hand, your Lordships will consider, that tho' the Portion of the only Daughter of this Marriage was ascertained to be 30000 Merks, with Annualrent from her Age of sixteen, or Marriage, yet as it could not with Certainty appear so long as the Marriage subsisted, whether an Heir-male

of the Marriage might not yet exist, the Daughter's Portion behoved to be in Suspense until the Dissolution of the Marriage, at least until there should be an absolute Certainty that there could be no Issue-male thereof, though when the Condition took place the Portion drew back to that Period from which it was provided to carry Annualrent. This Point is not disputed; and the Respondent considers it to be a necessary Consequence thereof, that it could not possibly be in the View of Parties that the Annualrents of the Daughters Portion not then exigible, and which possibly might never be due, were to be an annual Burden upon the Rents during Sir *John's* Life and the standing of that Marriage. He could not pay these when there was no Creditor to receive them, and it will never be presumed to have been the Meaning of Parties that he was annually to stock up such a Sum out of the current Rents to answer a contingent Claim of Annualrents upon his Daughter's Portion, which probably might not be acclamable during his Life.

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And truly upon the Plan of this Argument, the Petitioner must maintain that from the Moment a Daughter attained the Age of sixteen, Action was competent at the Instance of the collateral Heirs against Sir *John*, to appropriate and set apart such an annual Sum out of the Rents of that Estate for answering the Annualrents of the Daughter's Portion, in case the same should thereafter become due. It was Matter of Uncertainty whether Sir *John* might leave a separate Estate sufficient to answer these. This was a Risk which the collateral Heirs were not bound to submit to. If they would be intitled to Relief out of Sir *John's* separate Estate, they must have been equally intitled to an Action against Sir *John* himself, *rem intactam servare*, and not only to pay the annualrents of the Daughter's Portion from the Time it became exigible, but also to set apart so much annually of the Rents of the Estate as might corresponded to these Annualrents, in case the same should afterwards become due. An Action of this Kind

Kind would be a Novelty in the Law attended with the greatest Absurdities, and furnish a Handle to remoter Heirs of Entail to give perpetual Disquiet to the Heir in Possession. And therefore the Respondent does with Reason contend, that this single Consideration, *viz.* that the Annualrents of the 30,000 Merks were not exigible during Sir John's Life, when it would only with Certainty appear that there would be no Heir-male of the Marriage, is real Evidence that it could not be in the View of Parties that he should be bound out of the current Rents of the Estate to pay the Annualrents of the 30,000 Merks when such Annualrents were not due or claimable during his Life.

If Sir John Schaw had only been a Liferenter of this Estate, and consequently liable to pay the current Annualrents of all Debts that affected the same, it is greatly doubted, whether the Annualrents of the 30,000 Merks, which was at best but a conditional and uncertain Debt during the standing of the Marriage, could upon the Existence of the Condition, by operating *retro*, have founded this Claim of Relief against Sir John himself: or his Heirs, in any separate Estate. It is thought the Defence would be good, that the *fructus* of the Liferent were *bona fide percepti & consumpti*, and that no such Annualrents were due during his Possession: And if this would have been a good Defence against the Claim of Relief, upon Supposition of Sir John's being but Liferenter of that Estate, it must surely operate with double Force, where his Possession was in virtue of his antecedent and undoubted Title of Property.

And when to all these is added that other Clause in the Marriage-contract above recited, which declares, that this present Tailzie and Irritancies thereof, shall be noways prejudicial to any Execution competent upon this Contract, in so far as the same is conceived in Favours of the said Mrs. Margaret Dalrymple, and the Daughters of the Marriage, failing of Heirs-male thereof, it is clear as Sun-shine, that the Tailzie, and e-

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very Clause therein contained, was to be held *pro non scripta*; in every Question relative to the Daughter's Portion of 30,000 Merks. She was to be at liberty to adjudge the Estate; that Adjudication, if suffered to expire, was to be effectual to carry off the Property of the Estate; The Sum of all which was, that the Tailzie was to be totally laid out of the Case, in every Question relating to the Daughter's Portion, and the Estate was to be considered as a Fee simple, limited to particular Heirs, without any prohibitive, irritant, and resolutive Clauses.

And therefore it is no good Answer to say, that the above Proviso did only respect the Interest of the Lady and the Daughters, *quoad* their Right of affecting the Estate in the fullest Manner, for Security or Payment of their Provisions, but was not meant to prejudice the Claim of Relief which the Heir of Entail in this Estate might have against Sir John Schaw's other Heirs; the contrary of this has been already established; and as the Petitioner rests this Claim of Relief singly upon the supposed implied Obligation, arising from the Nature of a Fee-tail, as obliging the Heir in Possession to keep down the current Annualrents of the Debts, the Answer must be equally good, that by that very Deed which imposed the Entail, this Sum of 30,000 Merks, and Annualrents thereof, were made a real Burden upon the Estate, and the Heirs of Entail taken bound to pay the same; so that they only did represent Sir John in the Obligation to pay both principal Sum and Annualrents; at least were primarily liable therefor: The Estate was given to them under that Burden, and the Entail was to be held *pro non scripta*, so far as concerned the Provisions to the Lady and the Daughters of the Marriage; and as a Consequence of the Premises, it was optional for Sir John, whether to pay these Annualrents, or to leave them in whole or in part a Burden upon the talzied Lands, without Relief against him or his other Heirs. But the Respondent has already said, and will not repeat, that these Annualrents were

were neither due, exigible, nor payable during Sir *John's* Life; so that he could not contravene any implied Obligation, by not paying the same. The Petitioner takes hold of a Doubt suggested by one of your Lordships, whether Sir *John* could in any Shape impose a greater Burden upon this Estate than the 50,000 Merks, and therefore insists that the 30,000 Merks and Annualrents must impute to exhaust the reserved Faculty; and consequently that he as Heir of Entail in this Estate, can be no further liable than for 50,000 Merks and Annualrents thereof since Sir *John's* Death.

But as the Generality of your Lordships were not at all moved with this Difficulty: It proceeds upon this Supposition, which can with no Reason be maintained, and which is already obviated, *viz.* That the Faculty or Power reserved to Sir *John*, and the Heirs of Entail, of charging the Estate with 50,000 Merks for Provision to the younger Children, gave no Power to burden the Estate with the Annualrents of that Sum, a Construction manifestly repugnant to every Clause in the Settlement; to that Clause which supposing Adjudications to be led for the Childrens Portions to the full Amount of the 50,000 Merks, declares these Adjudications to be forever redeemable upon Payment of the principal Sum and Annualrents, and to that other Clause which impowers Sir *John* and the Heirs of Entail to give Jointures to Wives, not exceeding a fourth of the free Rent, discounting *inter alia* the Annualrents of the Childrens Provisions. Nor is it possible to construe the Clause in this limited Sense, without doing Violence, both to the Words and Intention. The Children were to be intitled to Provisions at such Age, or upon such Events, as they might have Occasion for them. A Child's Provision not bearing Annualrent is a Novelty; and because it was foreseen that the Circumstances of the Family might require to borrow Money for answering these Provisions, Sir *John* and the Heirs of Entail are impowered to contract Debt to that

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Extent; for the above Purposes: and to charge the Estate therewith, which, in the Nature of things, supposes and implies that the Debts so contracted must carry Annualrent, as it would be absurd to imagine that any third Party would lend his Money without Annualrent.

And as to the Argument founded upon that Clause of the Contract which declares that the 30,000 Merks which the Father and Son became obliged to pay to an only Daughter excluded, should *pro tanto* exhaust the Faculty, it is obvious that the Clause can have no other Meaning, but that the principal Sum contained in the Obligation, should *pro tanto* exhaust the principal Sum in the Faculty, but can with no Propriety be interpreted so as to make the Annualrents of the 30,000 Merks impute in Extinction of the principal Sum which Sir John had Power to contract in virtue of the reserved Faculty.

It cannot be disputed that Sir John, upon his Daughter's Marriage had Power to burden the Estate, not only with the principal Sum of 30,000 Merks in Impliment of the Obligation, but also with the principal Sum of 20,000 Merks more in virtue of the reserved Faculty, and as the necessary Consequence of burdening the Estate with these two Capitals, was to make both bear Annualrent, it would be inconsistent to plead that the Annualrent of the one Provision should exhaust the Capital of the other.

In order to illustrate this, let it be supposed that Sir John had burdened the Estate with no more than 30,000 Merks in favours of the Lady Catheart, with the Annualrent thereof, from the Time of her Marriage, and that he had thereafter entred into a second Marriage, it will not be disputed that Sir John would have had Power in virtue of the Faculty, to have burdened the Estate with the remaining Sum of 20,000 Merks in favours of the Daughter of that second Marriage: Nor will it be pretended that the Annualrents due on the former Bond of 30,000 Merks, would have exhausted the Faculty; and if it would,

would have been so, where the Provisions had been made in favours of Daughters of different Marriages, the same Rule must hold in the present Case, tho' both Provisions are granted to Sir John's only Daughter, in whose Favours he had Power to burden the Estate with the principal Sum of 20,000 Merks, over and above the principal Sum of 30,000 Merks which he was obliged to pay to her, with Annualrent from the Time of her Majority or Marriage, in the Event of her being excluded from the Succession.

Under this Article the Petitioner further complains of so much of your Lordships Interlocutor above recited, as decerns for the 3000 Merks of Penalty contained in the Bond of 30,000 Merks, which, says the Petitioner, he is positive was not mentioned in the Debate, nor by your Lordships at advising, he considers the Interlocutor in this Particular to be so ambiguously worded, as to admit of a Doubt whether he is not thereby also decerned for the Annualrents of that Penalty; and therefore insists that these Words should be left entirely out, as nothing has hitherto occurred for subjecting him to this Penalty.

The Respondent for Answer says, that there is no such Dubiety in the wording of the Interlocutor, as can create a Doubt, whether there is any Decerniture for the Annualrents of this Penalty, none such were demanded, nor are they decreed. The Decerniture is in common Form for the Penalty itself; and the Respondent is advised, that as this Penalty is contained in the Bond of 30,000 Merks, for which the Petitioner is found liable, the Decerniture for the Penalty behoved to go of Course, and was Matter of mere Form: And it is unknown to the Respondent, that any Case did ever occur where a Conventional Penalty was not decerned for alongst with the principal Sum, and Annualrents in that Obligation, which contains the conventional Penalty: So that this could not be the Subject of Litigation at the Bar, or of Argument amongst your Lordships at advising; it is as much Matter of common Style as the Word *Decern*, for this obvious Reason, that your Lordships pay

cannot know what after Expences the Party may be put to in making good that Debt. If the Petitioner is now disposed to pay down the 36,000 Merks, and Annualrents, the Respondent is willing to take his Money, and to pass from the Penalty; but as Occasion may require that Diligence should yet be used for making good this Sum, your Lordships cannot separate the Penalty from the Sum itself.

The Petitioner proceeds, in the next Place, to reclaim against that Branch of your Lordships Interlocutor which repels the Reasons of Reduction of the Feu-right of the Town of Greenock.

As to which, your Lordships will recollect, that by the Charter 1685, in favours of the late Sir John Schaw's Father, there was a Power reserved to the Grandfather, *faciendi et concedendi feudifirmas domorum, tenementorum, etiamque hortorum infra urbem de Greenock*. From which it would appear, that at this Period, Sir John the Grandfather, in granting that Charter, carried his Views no further; but as Occasion should offer of feuing out the Dwelling-houses, and other Tenements in that Village, with the Gardens thereto belonging. Thus far only he reserved to himself the Power of feuing, and, which Reservation was necessary, even to that limited Extent; because by the Charter 1685, the Fee was vested in his Son.

But as this could not have obstructed the Son, who was limited Fiar, from feuing out any Part of the whole Estate; so by the Charter 1686, in favours of the late Sir John, a Faculty or Power in some Respects similar, but in others different, was reserved to Sir John the Father, in these Words, *Reservand. plenam potestatem et libertatem dicto Joanni Schaw, domos seu edificia in Greenock in feudo demittere, dummodo eadem non reddent minus annuatim nomine feudefirmæ, quam unam marcam propter lie fall. terræ edificat; et tres solidos et quatuor denarios monetæ Scotiæ, propter unamquamque lie fall. terræ non edificat*. By the Charter 1685, there was no Limitation as to the Quantum of the

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Feu-duty; but by the Charter 1686, this Limitation was imposed that the *terrie edificat* should pay one Merk of Feu-duty for each Fall, and the *terre non edificat* three Shillings and four Pence *Scots* per Fall. But as these reserved Powers and Limitations were temporary and personal to the Lifereuters, they ceased with them; and the late Sir John before he entered into his Marriage-contract 1700, was at full Freedom to have feued out the whole Estate, or any Part thereof, in such Terms as he thought proper. p416

At this Period the Bulk of the Village of *Greenock* consisted of a Number of pitiful mean Houses, Office-houses and Yards, which yielded a very inconsiderable Rent, attended with a very great annual Expence; and as it occurred to the late Sir John Schaw, when he came to make his final Settlement in 1700, upon Occasion of his Marriage, that the general Prohibition to which he voluntarily subjected himself *de non alienando*, ought to be limited, so as to reserve full and ample Power, both to him and the Heirs of Entail in their Order, to grant Feus of any Part of the Estate under proper Regulations; This was accordingly done by the following Clause; Reserving always, notwithstanding of the Premisses, full Power and Liberty to the said Sir John Schaw, and, after his Death, to John Schaw his Son, and the Heirs of Tailzie and Provision above-specified, to grant Feus or long Tacks, for such Space as they shall think fit, of any Part or Portion of the said Lands, the Feu or Tack-duty not being under twenty Shilling *Scots* for each Fall of Dwelling-houses, and five Shilling *Scots* for each Fall of the Yards and Office-houses. In which there occur these material Variations from the former reserved Powers by the Charter 1685 and 1686; 1st, that as these did only respect the Houses, Tenements and Yards in *villa de Greenock*, the Tailzie 1700 carried the reserved Power so much further, as to authorise the feuing any Part of the whole Estate, as an Exception from the general Prohibition to sell. 2^{dly}, That Power of feuing was

not limited to the late Sir John himself, but was communicated to the whole Heirs of Entail. *3dly*. Whereas by the Charter 1686, the only Limitation in the Exercise of that reserved Power, was, that the *terra edificat* should pay a Feu-duty of one Merk *per* Fall, and the *terra non edificat* three Shillings and four Pence; This Feu-duty was increased by the Tailzie 1700 to 20 Shilling *Scots*, for each Fall of Dwelling-houses, and five Shilling *Scots* for the Fall of Yards and Office-houses.

Pursuant to this reserved Power, the late Sir John Schaw, from time to time, feued out some of the Houses, Offices, and Yards in the Town of Greenock, at the above mentioned Rates of 20*s.* for the Fall of Dwelling-houses, and 5*s.* for the Fall of Yards and Office-houses.

But as the proposed Improvement of the Town of Greenock made but slow Advances, as few Adventurers offered, who would build upon their own Charges, it occurred to Sir John, that the likeliest Method to bring this Project to bear, would be to grant one general Feu of the Residue of his Property in that Village to one single Person, who might thereby be encouraged to lay out such Sums, as were necessary for carrying this Scheme into Execution; and as he considered himself to be under no Restraint in this Respect, either in the Choice of the Person to whom he should grant that Feu, or the *Quantum* of the Feu so to be granted, provided he kept within the Rules prescribed by the reserved Faculty, *viz.* of 20*s.* for the Fall of Dwelling-houses, and 5*s.* for the Fall of Office-houses and Yards; so Sir John, of this Date, granted a Feu of the Premises in the above Terms to his Daughter the Lady Cathcart, and her Heirs therein mentioned; and as by Means thereof a very considerable Addition was made to the Rent of the entailed Estate, Sir John could with no Reason apprehend, that his Power of granting this Feu would ever have been called in Question by the succeeding Heirs of Entail.

The

3d August
1719.

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The whole Area occupied by this Village of *Greenock*, composed of Dwelling-houses, Offices and Yards, amounting to 26 Acres, 2 Roods and 27 Falls, including 6 Acres, 3 Roods, 31 Falls, and 14 Ells, which had been antecedently feued out, and the High-street and Vennels, which extended to 1 Acre, 3 Roods, 29 Falls, and 22 Ells; 1 Acre, 1 Rood, 34 Falls, and 12 Ells of the remaining Property was occupied by Dwelling-houses, tho' of the meanest Quality: And as most most of these Dwelling-houses had their respective Office-houses, the like Quantity of Ground, or thereby, was occupied by these; and what remained of the Property-ground was divided into so many little Yards, as Accessories to the different Dwelling-houses. When this Feu came to be renewed in the Year 1751, in Favours of the now Respondent, as Heir to his Mother, containing a *Novodamus*, it became necessary to distinguish the Boundaries of that Feu more accurately than had been done by the original Grant, leaving out the Streets and Vennels, which are *juris publici*; and by an accurate Survey and Measurement of the Premises, as then taken,

	A.	R.	F.	E.
The whole Area was found to consist of	26	2	27	
From which being deducted the old Feus, extending to 6 Acres, 3 Roods, 31 Falls, 14 Ells, and the Streets and Vennels extending to 1 Acre, 3 Roods, 29 Falls, and 22 Ells; these making in whole	8	3	21	

The total Subject feued to the Respondent was

But of which 2 Acres, 3 Roods, and 6 Falls being necessary for the new Streets and Vennels	2	3	6	
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All that will remain with the Respondent for Houses, Office-houses and Yards, is

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In consideration of which, he pays an annual Feu duty of 888 l. 10 s. 5 d. which thereby becomes a constant, certain, improved Rent to the Heirs of this Entail, in lieu of the former precarious mean Rent, attended with a great annual Expence in keeping up and repairing these old Fabricks.

And upon this State of the Case, the single Point for your Lordships Consideration is, Whether Sir John, by granting this Feu, has exceeded the Powers reserved to him by the Entail itself.

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The Petitioner is pleased to say, that in his humble Apprehension, no more was thereby meant but to empower the Heirs of Entail to feu the Houses in the Town of *Greenock*, with necessary Yards and Officehouses for the Improvement and Advancement of that Town, which was the great Object of Attention; that in order to attain this End, it was supposed to be a reasonable and necessary Act of Administration to grant different Feus of such small Parcels of the aforesaid Area, as different Persons might have Occasion for, who were willing upon their own Expence to build a Dwelling-house, with Office-houses and Yards for their Residence and Accomodation; and therefore without disputing, whether in the proper Construction of this reserved Power the same was confined to what was then built, or whether upon building other Houses, with proper Yards and Office-houses *infra urbem de Greenock*, these may not also be feued at the Rates appointed by the Tailzie. What he principally insists upon is, that this Power of Feuing was limited to the *villa de Greenock*. 2dly, That at no Rate could it be thereby intended to justify one total Feu of the Bulk of this *villa* to one Person, who by subfeuing the same upon more advantageous Terms would be interposed between the Overlord and the Proprietor, and intercept a great Part of the Profit which the Heir of Entail might have reaped if this Feu had not been granted.

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With respect to the first of those, the Petitioner is not consistent with himself in the Construction he now contends for.

for; for in his original Information (*fol. 19.*) his Words are:
 ' At the same Time, as the Clause is not restricted to the
 ' Town of *Greenock*, or its Neighbourhood, but respects a-
 ' ny Part or Portion of said Lands, the Pursuer does not
 ' contest that Sir *John Schaw* might have lawfully granted
 ' Feus or long Tacks of so many Falls of Ground, as he
 ' should agree for with the respective Feuars or Tacksmen he
 ' should contract with, in order to the Erection of Dwelling-
 ' houses, Yards or Office-houses, and by Degrees to form
 ' Villages or Townships consisting of Fishers or Manufacturers
 ' upon any convenient Part of the Estate.'

How the Petitioner will reconcile this Concession in the
 outsetting of the Cause with the Argument he now uses in this
 reclaiming Petition, is not so easy to conceive. But however
 the Petitioner may extricate himself from this Contradiction,
 though the Respondent will readily admit that the *villa de*
Greenock was principally in view as the most proper Place
 for granting these Feus, by Reason of the Conveniency of
 the Harbour and other Advantages, it is impossible with any
 Colour of Reason to circumscribe the reserved Power within
 the Limits of that *villa*, when the Clause is so very ex-
 press as to reserve Power of feuing any Part or Portion of
 the said Lands. This was undoubtedly competent to Sir
John before he made the Tailzie, and in making thereof,
 having reserved to himself this Power, he was as much intitled
 to feu any Part of the Lands as formerly, with this single Li-
 mitation, that he should feu at the Rate of so much *per* Fall
 of the Dwelling-houses, and so much less *per* Fall of the Of-
 fice houses and Yards.

And this Point being fixed, it will be Matter of Difficulty
 to introduce any such Condition as should limit Sir *John* in
 the *quantum* of the Feu to be granted. All that the Tailzie re-
 quires is, that the Dwelling-houses should pay a Feu-duty of 20
 Shillings *Scots per* Fall, and the Office-houses 5 s. *Scots*;
 and as it is not alledged that Sir *John* has counteracted this
 Rule,

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p424 Rule, he was in every other Respect at full Liberty to grant these Feus in greater or smaller Quantities, or upon such Terms as he thought proper, it being justly deemed a sufficient Security to the Heirs of Entail, that no Feu should be granted either of Dwelling-houses, Office-houses or Yards, but at the above Rates, whereby a great Addition of the Rent would accrew to the Heir of Entail.

And the Absurdity of such a Restriction will be obvious from this single Consideration, that supposing the whole to have been parcelled out in 50 different small Feus, any one Person might the next Day purchase the whole, and subfeu the same upon such Terms as he thought proper. And therefore without further Argument upon this Point, which seems so extremely clear, it is hoped your Lordships can have no Difficulty in adhering to this Part of the Interlocutor.

p425 For though the Petitioner *an passant*, throws out a Variety of other Grievances relative to the Constitution of this Feu, such as the Exemption from Thirlage of *investa & illata*, the Taxation of the Casualties of Superiority, the Freedom of the Harbour, Privilege of Quarrying, and others of the like Kind; yet as no particular Conclusion is drawn from these, the Respondent shall only observe, that as the single Limitation in the reserved Faculty, respected the *Quantum* of the Feu-duties; and as none of the Particulars hereby dispenced with, are *de essentialibus feudi*. Sir John was at Liberty in every other respect to grant these Feus in such Form and Manner as he thought proper.

And more particularly, as to the Exemption from Shore-dues, or Privilege of the Harbour, for Reparation of which, the Respondent was in some Degree instrumental in procuring the late Act of Parliament, imposing a Duty on the Pint of Ale brewed and vended within the Liberties of the Town, as the sole Inducement of feuing out the *villa de Greenock* was to promote the Trade of that Place, it was just and reasonable, for an Encouragement to Strangers, and others willing to lay out their Money in building there, that they should have the
Free.

Freedom of the Harbour, or an Exemption from Duties, which is no Alienation of the Harbour itself, no more than an Exemption from Thirlage, would be an Alienation of the Mill. And the Respondent cannot help saying, it is going very near to Work, when, Trifles, such as these, are complained of, as the high Feu-duty which necessarily must be paid for every Fall, is a full Recompence for all these trivial Conveniences.

And it is still with less Reason that the Petitioner complains of the Immunity from Thirlage, when your Lordships are informed, that the whole Barony was formerly thirled *quoad grana crescentia*; that the Respondent remains thirled in these very Terms, and that the Exemption granted is only of *investa & illata*, which is improperly characterised an Exemption, where there was no such antecedent Affliction.

The Petitioner proceeds to impugn that Part of your Lordships Interlocutor, which repels the Reason of Reduction of the Feu-right 1751, of that Part of the Brae adjacent to some of the Yards on the South Side of the Town of Greenock, and Piece of Flat Ground on the Top of the said Brae, containing in whole 3 Acres, 1 Rood, 33 Falls, and 18 Ells. And the whole of the Argument seems to resolve in this, that this small Piece of Ground, is in Effect Part of the Policy, being at no great Distance from the Mansion-house, and within Sight thereof; and therefore should not be understood to have been intended to be comprehended under these general Words, *Reserving Power to Feu out any Part or Portion of the said Lands*.

The Answer to which in point of Law, need not be repeated, *viz.* That the unlimited Power to feu any Part or Portion of said Lands, must reach every Part or Portion, *qui omne dicit nihil excipit*. In Fact it is not true that this Spot of Ground is any Part of the Policy about the House, of which your Lordships were fully satisfied, from the Plan exhibited when this Judgment was given; and therefore the Interlocutor very properly takes notice in describing the Situation of this Brae, that it is adjacent to some of the Yards on the

the South Side of the Town of *Greenock*. It is, at least six Times as far from the Mansion-house as the Town of *Greenock* is; any Trees thereon growing, were planted by Sir *John* himself, not many Years ago, and the Petitioner knows well that it is intended for the Stance to the Church that must be built.

And here the Petitioner again runs counter to the whole of his former Argument. He had hitherto supposed the aggrandizing the Town of *Greenock*, to be what was principally in view by the reserved Faculty to feu; he admitted that Faculty was not confined to the *Villa of Greenock* only; and if that is so, what could be more consonant to this original Purpose of extending the *villa de Greenock*, than that this small Piece of Ground, so contiguous thereto, might be granted in Feu.

The last Branch of this Interlocutor, which the Petitioner impugns, respects the Tack of the western Barony of *Greenock*, from the Reduction of which the Respondent stands foilzied. And the Respondent will be forgiven to say, that the only Apology that can be offered for the Petitioner's reclaiming upon this Point is, that as none of the Deeds granted by Sir *John* were to go unchallenged, this could not decently be overlooked.

Thus far Parties are agreed, that the Tack is not granted for any longer Endurance than is allowed by the Tailzie. 2dly, That it is granted for the very same Rent that these Grounds formerly paid; and as the Tailzie reserves Power to Sir *John* to grant Tacks of all or any Part of the Estate, for any Number of Years not exceeding 19, without Diminution of the Rental, it requires some Ingenuity to invent any colourable Ground for challenging this Tack, which, if rightly understood, resolves in these two Particulars: First, That some Part of these Grounds were under Tack to the natural Possessors, when this Lease was granted to the Respondent. 2dly, That he is not thereby taken bound to uphold the whole Houses that were upon these Grounds at the time of his Entry,

try, and to leave them in Repair at his Removal; but only to leave in sufficient Repair such of the Houses as are upon the Ground at the Ist of the Lease.

With respect to the first of these, the Fact is true, that some Part of these Grounds were under Tack, which had a Currency for some Years, when this Lease was granted to the Respondent. But he is not able yet to comprehend, how this Circumstance should furnish the Colour of an Objection. It will not surely be pretended, that by Force of this Tailzie, Sir John was bound to preserve the Farms upon this Estate in the same Distribution as they were at the Time; that he could not throw two Farms into one, or make two Farms out of one. He remained Proprietor as formerly, under such Limitations only as he had voluntarily subjected himself to. The Management of an Estate is incident to Property; nor can the Respondent conceive, what could have hindered Sir John the next Day to have let the whole Estate to one Tenant for 19 Years, at the Rental it then paid. He could have let any Part of it with Power to sublet, whereby the principal Tenant might have had as many Subtenants as he pleased, and *a fortiori* he might let the whole to any one Person, with Power to him to sublet. This noways resembles the Case of an Overlord's interposing a Superior between him and his Vassals; such Tacks are frequent and usual: The reserving Clause is noways contradictory thereto; and if Sir John did not exceed his Powers, he was not accountable to his Heirs of Entail, for the Rationality of his Administration.

And upon the same Principles the other Article of Complaint is if possible more frivolous. Every Body knows that a Number of small Tenants is Destruction to an Estate, and the greatest Obstacle to Improvements. If, instead of 20 Families to be maintained upon the Produce of these Grounds, they can be equally well managed when thrown into a few larger Farms, the Advantage from thence accruing is so apparent, that it would be indecent to use Words upon it. And the supposed Prejudice which would accrue to the Heirs

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of Entail at the 1st of the 19 Years, when possibly there may not be one third of the superfluous Houses that were standing upon it at the Commencement of the Tack, and which require to be kept up at a very great annual Expence, is all Imagination, repugnant to common Sense, and triply compensated by the greater Advantage which accrues to the Estate through its being relieved of so unprofitable a Burden. The Respondent must for his own Sake keep up such a Number of Houses as is requisite for the due Culture and Management of these Grounds, which is sufficient Security to the Heirs of Entail that nothing will be maliciously done to hurt him.

And therefore the Respondent will only add, that if Countenance were given to Objections of this Kind, it would open such a Door to vexatious Processes at the Instance of Heirs of Entail pretending to challenge or find Fault with the Management of the Heir in Possession, as would be extremely undesirable. If Sir *John* himself had judged it expedient to throw two or three smaller Farms into one, and in that View to take down a few superfluous Cottages, what for an Appearance would it have had that this Petitioner should have brought such an Action as the present against Sir *John* himself, finding Fault with his Management as unprofitable or hurtful, and therefore concluding against him to restore those Grounds to their primitive State. A Process of this Kind surely must have appeared extremely vexatious and groundless; nor can the Respondent see any material Difference between that and the present Case, where Sir *John*, instead of taking these Grounds into his own Possession, has let them to one Tenant at the former Rent, and for no greater Number of Years than he was impowered to do.

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In respect whereof, it is hoped your Lordships will affirm the several Parts of the Interlocutor above-recited, in so far as the same are complained of by the above-mentioned Petition, and will adhere to your former Interlocutor upon these Points.

ALEX. LOCKHART.

